

UNITED STATES DISTRICT COURT
for the
Southern District of Alabama

United States of America)
v.) Case Nos. **07-00135-KD**
MICHAEL ORANGE) **07-00178-KD**

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of the defendant under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion,

IT IS ORDERED that the motion is:

X DENIED. GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of months **is reduced to months.**

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Offense Level: _____ Amended Offense: _____
Criminal History Category: _____ Criminal History: _____
Previous Guideline Range: _____ to _____ months Amended Guideline Range: _____ to _____ months

II. SENTENCE RELATIVE TO AMENDED GUIDELINE RANGE

- The reduced sentence is within the amended guideline range.
 - The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range.
 - Other (explain):

III. ADDITIONAL COMMENTS: Because of an exception for offenses involving multiple controlled substances, application of Amendment 706 does not lower defendant's offense level. Application Note 10(D) to the United States Sentencing Guidelines Section 2D1.1 explains that a combined offense level may be calculated and then reduced by the two level reduction intended by Amendment 706. However, the two level reduction is not applied if it "would result in a combined offense level that is less than the combined offense level that would apply if the offense involved only the other controlled substance". U.S.S.G. § 2D1.1, Historical Notes, 2008 Amendments.

At sentencing, defendant Orange was held accountable for 37.68 grams of crack cocaine and 7.84 kilograms of cocaine. Thus his case involved multiple controlled substances. The 7.84 kilograms of cocaine alone results in an offense level of 32. The total

marijuana equivalent for the crack cocaine and cocaine was 2,321 kilograms which results in a combined offense level of 32. Applying the two level reduction to the combined offense level yields an offense level of 30. However, because the combined offense level after the two level reduction is less than the offense level for the cocaine alone, the reduction does not apply and defendant Orange's offense level remains at 32. In other words, because his offense level for the cocaine alone is 32, his offense level cannot be any lower than 32.

Defendant filed a response to the court's show cause order wherein he argues that this court has discretion to depart from the Guidelines when addressing a motion for reduction of sentence under 18 U.S.C. § 3582(c)(2), and therefore, is not bound by the Guidelines or the policy statements. However, the Eleventh Circuit Court of Appeals has concluded that the Supreme Court decisions in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005) and United States v. Kimbrough, — U.S. —, 128 S. Ct. 558 (2007) do not apply to § 3582(c)(2) proceedings and has held "that a district court is bound by the limitations on its discretion imposed by § 3582(c)(2) and the applicable policy statements by the Sentencing Commission." United States v. Melvin, 556 F. 3d 1190, 1190 (11th Cir. 2009) (per curiam).

Except as provided above, all provisions of the judgment shall remain in effect.

IT IS SO ORDERED.

Order Date: June 30, 2009

/s/ Kristi K. DuBose

Judge's signature

Effective date:

(if different from order)

United States District Judge

Printed name and title